REMARKS

This Amendment is responsive to the Office Action dated August 23, 2007. Applicant has amended claim 77 to correct a typographical error. Accordingly, Applicant has amended claim 77 for reasons unrelated to patentability. Claims 1-6, 8-29, 31-49 and 69-82 are pending.

Allowable Subject Matter

The Office Action indicated that claims 47-49, 69-76 and 79-82 are allowed. The Office Action also indicated that claims 13-15 and 36-39 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. Applicant appreciates these indications of allowability.

Additionally, Applicant submits that the rejection of claim 40 under U.S.C. § 102(e) is inconsistent with the Office Action's indication of allowability. Claim 40 is dependent upon 36, which the Office Action indicated is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. Applicant submits that claim 40 would also be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims, at least by virtue of its dependence on allowable claim 36.

Claim Rejection Under 35 U.S.C. § 102(e)

The Office Action rejected claims 1-6, 8-12, 16-29, 31-35, 40-46, 77 and 78 under 35 U.S.C. § 102(e) as being anticipated by DiLorenzo (US 6,819,956). Applicant respectfully traverses the rejection. DiLorenzo fails to disclose each and every feature of the claimed invention, as required by 35 U.S.C. § 102(e), and provides no teaching that would have suggested the desirability of modification to include such features.

Independent claims 1, 22, 77 and 78

As one example, DiLorenzo fails to disclose or suggest a method in which determining a value of at least one activity metric for a therapy parameter set comprises comparing each of the periodically determined activity levels associated with the therapy parameter set to a threshold value and determining an average length of time that consecutively determined activity levels

associated with the therapy parameter set were above the threshold, as required by Applicant's independent claim 1.

Similarly, with respect to independent claim 22, DiLorenzo fails to disclose or suggest a medical system comprising a processor that compares each of the periodically determined activity levels associated with a therapy parameter set to a threshold value, and determines as an activity metric value for the parameter set an average length of time that consecutively determined activity levels were above the threshold.

DiLorenzo does not disclose or suggest determining an average length of time that consecutively determined activity levels associated with the therapy parameter set were above a threshold. The Office Action failed to address this requirement of independent claims 1 and 22. Instead, the Office Action merely stated that DiLorenzo describes threshold discriminators that are used to provide a classification of the activity levels of the measured tremor based on threshold criteria.

DiLorenzo additionally describes that the outputs of the threshold discriminators may be inputted into an integrator and a counter to determine the total activity of each type of movement over at least one period of time and the number of episodes of each of the types of movement over at least one period of time, respectively.[1] Neither determining the total amount of a type of activity over a period of time, nor determining the number of episodes of an activity type over a period of time, involves determining whether the activity or episodes were consecutive. Consequently, these teachings of DiLorenzo are significantly different from determining an average length of time that consecutively determined activity levels associated with the therapy parameter set were above the threshold, as required by independent claims 1 and 22. DiLorenzo does not teach determining the average length of time that consecutively determined activity levels were above a threshold, and instead merely teaches determining the total activity of each type of movement and number of episodes, whether or not they were consecutive.

[1] DiLorenzo, column 30, lines 1-39.

As another example, with respect to independent claims 77 and 78, DiLorenzo also fails to disclose or suggest comparing at least one of a mean or median activity level for each of the therapy parameter sets to at least one threshold and selecting an activity metric value for each of the therapy parameter sets from a plurality of predetermined possible activity metric values based on the comparison. The Office Action failed to address this requirement of independent claims 77 and 78. Instead, the Office Action merely stated that DiLorenzo describes threshold discriminators that are used to provide a classification of the activity levels of the measured tremor based on threshold criteria. However, DiLorenzo fails to disclose or suggest comparing at least one of a mean or median activity level for each of the therapy parameter sets to at least one threshold and selecting an activity metric value for each of the therapy parameter sets from a plurality of predetermined possible activity metric values based on the comparison and, therefore, fails to disclose or suggest the requirements of independent claims 77 and 78.

Claims 2-6, 8-12, 16-21, 23-29, 31-35 and 40-46

Each of claims 2-6, 8-12, 16-21, 23-29, 31-35 and 40-46 is dependent upon one of independent claims 1, 22, 77 and 78. For at least the reasons described previously with respect to independent claims 1, 22, 77 and 78, these dependent claims are also in condition for allowance. Additionally, DiLorenzo fails to disclose or suggest the requirements of several of these dependent claims, some of which are discussed below.

With respect to claims 2 and 25, DiLorenzo fails to disclose or suggest filtering a signal generated by an accelerometer to pass a band from approximately 0.1 Hz to approximately 10 Hz. In support of the rejection of claims 2 and 25, the Office Action stated that DiLorenzo suggests bandpass filtering. However, DiLorenzo does not suggest the frequency range of approximately 0.1 Hz to approximately 10 Hz recited in claims 2 and 25.

DiLorenzo also fails to disclose or suggest that periodically determining an activity level comprises determining when the patient is awake and periodically determining an activity level while the patient is determined to be awake, as required by claims 3 and 26. The Office Action cited DiLorenzo as determining intrinsic disease states, including patient wakefulness. DiLorenzo describes intrinsic disease states as disease states which characterize the state of disease at a given point in time and extrinsic disease states as variations in intrinsic disease states, e.g., due to an external event such as awakening. DiLorenzo does not disclose or suggest

determining when the patient is awake. Instead, DiLorenzo describes monitoring intrinsic and extrinsic disease states and merely describes awakening as one external event that may cause a variation in an intrinsic disease state.

With respect to claims 21 and 46, DiLorenzo fails to disclose or suggest a trial neurostimulator. As acknowledged in the Office Action, DiLorenzo teaches the use of an intracranial stimulator. DiLorenzo does not disclose or suggest a trial neurostimulator, as required by claims 21 and 46.

In order to support an anticipation rejection under 35 U.S.C. § 102(e), it is well established that a prior art reference must disclose each and every element of a claim. This well known rule of law is commonly referred to as the "all-elements rule."[2] If a prior art reference fails to disclose any element of a claim, then rejection under 35 U.S.C. § 102(e) is improper. [3]

DiLorenzo fails to disclose each and every limitation set forth in claims 1-6, 8-12, 16-29, 31-35, 40-46, 77 and 78. For at least these reasons, the Office Action has failed to establish a prima facie case for anticipation of Applicant's claims 1-6, 8-12, 16-29, 31-35, 40-46, 77 and 78 under 35 U.S.C. § 102(e). Withdrawal of this rejection is requested.

CONCLUSION

All claims in this application are in condition for allowance. Applicant respectfully requests reconsideration and prompt allowance of all pending claims.

In view of the clear distinctions identified above between the current claims and the applied prior art, Applicant reserves further comment at this time regarding any other features of the independent or dependent claims. However, Applicant does not necessarily admit or acquiesce in any of the rejections or the Examiner's interpretations of the applied references, or the Examiner's findings with respect to the effective filing date of any claims in this application. Applicant reserves the right to present additional arguments with respect to any of the independent or dependent claims.

---

[2] *See Hybritech Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367, 231 USPQ 81 (CAFC 1986) ("it is axiomatic that for prior art to anticipate under 102 it has to meet every element of the claimed invention").

[3] *Id. See also Lewmar Marine, Inc. v. Barient, Inc.* 827 F.2d 744, 3 USPQ2d 1766 (CAFC 1987); *In re Bond*, 910 F.2d 831, 15 USPQ2d 1566 (CAFC 1990); *C.R. Bard, Inc. v. MP Systems, Inc.*, 157 F.3d 1340, 48 USPQ2d 1225 (CAFC 1998); *Oney v. Ratliff*, 182 F.3d 893, 51 USPQ2d 1697 (CAFC 1999); *Apple Computer, Inc. v. Articulate Systems, Inc.*, 234 F.3d 14, 57 USPQ2d 1057 (CAFC 2000).

Please charge any additional fees or credit any overpayment to deposit account number 50-1778. The Examiner is invited to telephone the below-signed attorney to discuss this application.

Date: 11-21-07

By: _____

SHUMAKER & SIEFFERT, P.A.
1625 Radio Drive, Suite 300
Woodbury, Minnesota 55125
Telephone: 651.735.1100
Facsimile: 651.735.1102

Name: Jason D. Kelly
Reg. No.: 54,213